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ACCOMMODATIONS

Delaware, ahead of the (pregnancy) curves

by Lauren E.M. Russell

You no doubt have heard about the U.S. Supreme Court's latest decision in Young v. United Parcel Service, Inc. In that decision, the Court interpreted the language of the federal Pregnancy Discrimination Act, which requires that employers treat pregnant employees in the same manner as other individuals who are similarly limited in their abilities.

Among the Court's conclusions is that a policy that provides job- related accommodations to those who are injured on the job and those who have disabilities governed by the Americans with Disabilities Act (ADA) may also have to be extended to pregnant employees with physical restrictions. The decision opens a lot of questions, but Delaware employers may have a leg up in compliance!

Court's decision

In its decision, the Supreme Court addressed the case of Peggy Young, a UPS driver who became pregnant

after having several miscarriages. In connection with her pregnancy, her doctor placed her on a lifting restriction. UPS informed her that it couldn't accommodate her lifting restriction, and she was placed on unpaid leave. She eventually lost her employer-sponsored health coverage and filed suit against UPS for pregnancy discrimination.

UPS readily acknowledged that it refused to provide an accommodation to Young. It also acknowledged that it routinely provides accommodations to employees who:

1. Have a work-related injury;
2. Have lost their U.S. Department of Transportation (DOT) certification; or
3. Have a disability within the meaning of the ADA Amendments Act (ADAAA).

Historically, UPS's policy wouldn't have been a problem. As we all know, pregnancy is not, in and of itself, a disability. In addition, Equal Employment Opportunity Commission (EEOC) regulations have long held that an employer could have a policy that provided reasonable accommodations to work-related injuries but denied accommodations to similarly limited pregnant employees. The purpose of this carve-out is to allow employers to avoid workers' compensation costs by putting injured employees back to work on light duty.

So what changed? The EEOC has changed its stance on pregnancy. Under the ADAAA, many more limitations now qualify as disabilities, including fertility problems. In addition, the EEOC has made clear that it will be targeting systemic discrimination, including pregnancy discrimination, over the coming years. In connection with this change, the agency has just issued a "Notice of Proposed Rule Making," and we can expect new regulations with respect to pregnancy in the next year or two.

Setting those developments aside, the Supreme Court did not rule that UPS's policy was unlawful. Instead, it simply ruled that the trial court had to consider whether there was a legitimate nondiscriminatory reason for the distinctions drawn between the three classes of employees the company does accommodate and its refusal to accommodate pregnant employees

with lifting restrictions.

Impact on Delaware employers

This decision opens up a lot of questions, including what legitimate business considerations may justify a decision to accommodate some employees while not accommodating pregnant employees. But Delaware employers have some additional guidance in the form of the new pregnancy provisions of the Delaware Discrimination in Employment Act (DDEA).

As we have reported previously (see "Pregnant pause, part 2" in our October 2014 issue), the Delaware General Assembly amended the DDEA in 2014 to expressly prohibit discrimination against and require accommodations of pregnant employees, even when they aren't disabled within the meaning of Delaware antidiscrimination law.

While this statute places a heavier burden on Delaware employers, it also provides some guidance on compliance with the *Young* decision. In Delaware, there is no question that pregnant employees are entitled to take advantage of the same reasonable accommodation processes that are available to disabled employees — there is no need to determine whether you have a legitimate nondiscriminatory reason to make a distinction.

Bottom line

While Delaware may have raised the bar on employer treatment of pregnant employees, the amendments to the DDEA do provide guidance to Delaware employers. Unlike many other states, we don't have to wait for courts to parse which business concerns are "legitimate" and which are insufficient to justify different treatment of pregnant employees. We must accommodate them all under the same standards that apply to the ADA.

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